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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1606

HORTONVILLE JOINT SCHOOL DISTRICT NO. 1;
BOARD OF EDUCATION OF HORTONVILLE
JOINT SCHOOL DISTRICT NO. 1;
ROGER WEIHING, ROBERT HAUK,
JEAN MEADS, FLOYD MEYER,
MERLIN PLAMANN, VICTOR SCHROTH and
RONALD SUPRISE, individually and as officers
and members of the Board of Education
of Hortonville Joint School District No. 1;
and MARVIN OBRY, ROBERT KOHLS and
GENE RIEDL, individually and
as administrators of Hortonville
Joint School District No. 1,

Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and
MICHAEL WISNOSKI, ROSE MARIE OLSON,
THOMAS NADEAU, JUDY MURPHY,
RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

BRIEF OF WISCONSIN ASSOCATION OF SCHOOL BOARDS, INC., AS AMICUS CURIAE

James F. Clark
Karen A. Mercer
ELA, ESCH, HART & CLARK
Suite 600, 122 West Washington Avenue
Madison, Wisconsin 53703

Legal Briefs Company, 2700 Laura Lane, Middleton, Wisconsin 53562

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Petitioners,

v.

HORTONVILLE EDUCATION ASSOCIATION and MICHAEL WISNOSKI, ROSE MARIE OLSON, THOMAS NADEAU, JUDY MURPHY, RUSSEL LICHTE and RONALD HAMMOND,

Respondents.

BRIEF OF WISCONSIN ASSOCATION OF SCHOOL BOARDS, INC., AS AMICUS CURIAE

On certiorari review of Wisconsin Supreme Court decision entered February 5, 1975 (66 Wis. 2d 469, 225 N.W. 2d 658)

This brief *amicus* in support of Petitioners is filed by the Wisconsin Association of School Boards, Inc. with the written and filed consent of the parties as provided in Rule 42.2 of the Rules of this court.

INTEREST OF WISCONSIN ASSOCIATION OF SCHOOL BOARDS, INC.

The Wisconsin Association of School Boards, Inc. (WASB) is a voluntary non-stock membership corporation authorized and organized under chapter 181 of the Wisconsin Statutes. Of the 436 public school boards in the state of Wisconsin, with a total membership of 2850 persons, some 430 boards belong to the WASB.

The stated purposes of the WASB as set forth in its Articles of Incorporation and Bylaws, are to aid and assist public school boards and public school agencies of the state of Wisconsin in performing their lawful function, primarily through meetings, communications and dissemination of information, and to promote, support and advance the interests of public education in Wisconsin.

The WASB sees in this case a grave threat to the legitimate policy making function of local school boards and, therefore, to local lay control of education and to responsive representative government at the local level.

While the WASB believes that the petitioners in this case have and will continue to skillfully and ably present and defend their position, we are concerned that their natural preoccupation with the result of the State Supreme Court's ruling, which affects them most directly and immediately, may cause them and this Court to overlook some of the deeper, broader implications of real concern to school boards generally throughout Wisconsin and our country.

The position of the Wisconsin Supreme Court here challenged is that where, after extensive collective bargaining in which the school board was not uninvolved, teachers strike unlawfully, and where all material facts are undisputed or stipulated, the school board is not a sufficiently impartial decision maker in the constitutional sense (under the due process requirements of the Fourteenth Amendment) to determine on the basis of such facts and as a matter of local school government policy what action, authorized by law, should most appropriately be taken as to the striking teachers.

The principal concern of WASB member school boards and other public employers faced with a continuing illegal work stoppage is to restore the operation of the important governmental function delegated to the employer (in this case, the reopening of the public schools) with the shortest possible delay. In making the judgmental decisions required when determining how to cope with an illegal work stoppage, the public employer must consider a number of factors. As elected public officials, school board members have great concern for their responsibility to serve their community and their duty to provide for an educational program. They are in the position to take appropriate action in the best interests of the school district and they should retain that power. Yet the court decision under review here takes from the school board the right to make such important policy decisions. The disposition made by the Wisconsin Supreme Court allows a court, and not elected public officials charged with the duty of setting school policy and managing the schools, to make public policy decisions that are better left to the local administrative body.

SUMMARY OF ARGUMENT

The system of public education in Wisconsin is deeply rooted in the State Constitution which vests the supervision of

public instruction in a state superintendent and such other officers as the legislature shall direct. The constitution guarantees to all children between the age of 4 and 20 years the right to an education in the district schools which must be established and be as nearly uniform as practicable. This education shall be free and without charge for tuition.

In compliance with the constitutional mandate, the Public Instruction Code charges public school boards in Wisconsin with the duty to operate and manage the district schools which provide education to some 1,182,000 school-age children comprising 26.2% of the state's population.

Among the primary statutory duties of the school board are the duties to bargain collectively with the teachers and employ and dismiss teachers. Strikes by public school teachers are specifically prohibited by statute and the right to discharge for cause is authorized by law.

Misplaced reliance by the Wisconsin Supreme Court on U.S. Supreme Court decisions, primarily *Morrissey v. Brewer*, 408 U.S. 471, resulted in an erroneous determination by the Wisconsin Supreme Court that the Hortonville School Board, because of its involvement in the collective bargaining process prior to the unlawful strike, was not a sufficiently impartial decision maker, in the constitutional sense, to make the determination that teachers engaged in an illegal strike should be discharged from their jobs.

The function of due process is not furthered by requiring that the decision to discharge striking teachers be made by a person or tribunal other than the public school board. A school board can adequately serve the functions required of an independent decision maker in the type of case before the court where the question to be determined is whether or not the teachers have breached their employment contracts and engaged in an illegal strike and where there are no difficult factual or legal questions to be decided.

The fairness of the school board should not be impugned merely because the board has been, or is, involved in bargaining with the union representing the striking teachers, for the combination of the duties to bargain, and to hire and dismiss teachers involves no risk of bias in the constitutional sense. Furthermore, improper motivation on the part of the school board, without factual support, should not be inferred or assumed for the members of the school board are cloaked with a presumption of honesty, fairness, and integrity, and with having consciences and intellectual discipline capable of judging a particular controversy fairly on the basis of its own circumstances.

The purpose of the due process hearing is not to determine the board's course of action with respect to collective bargaining with the teachers, nor to determine the course of action best designed to reopen the schools. These nonjudicial functions, best left to the discretion of the school board, will not be manifested in the form of an unfair decision against a teacher who did not participate in the strike.

The remedy fashioned by the State Supreme Court substantially alters the rights of striking teachers and the policy making function of the school board in that: only if discharge is determined by a court to be the most reasonable response to the labor dispute may this course of action, among those authorized by law, be taken by the school board; public school teachers acting in violation of law are accorded greater rights than their counterparts in the private sector acting within the law; public school teachers are encouraged to make the school board a real adversary even in non-strike situations; a primary duty of the school board, i.e., to restore as quickly as possible the operation of strike-bound public schools, is substantially impeded.

To require that the school board must attempt to resolve an unlawful teachers strike by exhausting all other alternatives

before resorting to discharge would have a most serious and detrimental effect on the operation of the local public schools throughout the state of Wisconsin.

These alterations of the rights of striking teachers and of the policy making function of the school board are not required by due process. The school board properly met due process requirements when it applied an existing standard (cause) for discharge. Similarly the roll of the judiciary on review should be to determine whether an existing standard was fairly applied and not to select or decide policy questions or correct decisions made in the excercise of discretion or judgment.

In balancing the interests here involved the rights of the teachers will not be significantly furthered by having a tribunal other than the school board determine the existence of "cause", whereas the governmental interests involved weigh heavy on the scales in that: the rule of necessity applies, since there is no other body available to make the decision, the requirement of an independent decision maker as distinct from other due process requirements would threaten the governmental interest in preserving the board's ability to implement policy; the logically combined functions of collective bargaining and dismissing teachers lodged in the school board by the legislature lie at the core of public school governance and the judicial divestment of one of these functions would have a highly detrimental effect on representative government and threaten local lay control of education.

Even assuming that a Wisconsin public school board is not an impartial decision maker in the setting of this case, it may, nevertheless, discharge teachers engaged in an illegal strike, and in violation of contract, since, under Wisconsin law, adequate post-termination review procedures before an impartial decision maker are provided, including action for breach of contract, review by common law writ of certiorari and review by the Wisconsin Employment Relations Commission (WERC) in a prohibited practice proceeding.

The Wisconsin Supreme Court erred in holding that the post-termination review provided by certiorari and the WERC are inadequate because neither of these alternatives authorize the independent decision maker, on review, to determine whether the school board in discharging the teachers should have taken a more reasonable course of action in response to the strike.

The decision below should be reversed.

ARGUMENT

I. School Boards In Wisconsin Are Comprised Of Elected Public Officials Charged By Law And Their Constituency With The Duty To Manage And Set Policy For District Schools.

The system of public education in Wisconsin is deeply rooted in Article X of the State Constitution adopted in 1848./[1] Pursuant to the constitutional mandate, the legislature has enacted the code on Public Instruction (Title XIV, chapters 115-121, Wis. Stats.) which provides for the establishment of

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/[1]Article X of the Wisconsin State Constitution in pertinent part provides:

> The supervision of public instruction shall be vested in a state superintendent and such other officers as the legislature shall direct; and their qualifications, powers, duties and compensation shall be prescribed by law ... Section 1.
>
> ....
>
> The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 20 years; ... Section 3.

district schools throughout the state, directs the organization and election of boards of education in five identified classes of public school districts, and enumerates the powers and duties of such boards.

The petitioner Hortonville district is classified as a common school district. School districts so classified predominate in number (364 districts out of a total of 436)./[2] Common school districts, along with districts classified as union high school districts, are characterized by the statutory division of policy making functions between the school electors who act when assembled at a school meeting (s. 120.10, Wis. Stats.) and the school board with duties and powers set forth throughout the school code. However, in all 5 classes the school board is by statute given sole authority and control over the employment function./[3] More specifically, as to the common school district, s. 118.22 (2), Wis. Stats., provides that "no teacher may be employed or dismissed except by a majority vote of the full membership of the board." In *Curkeet v. Joint School District*, 159 Wis. 149, 152, 149 N.W. 708 (1914), The Wisconsin Supreme Court said in relation to the common school district board's duties:

> "School boards have thereby enjoined upon them very extensive duties in maintaining the common schools and in administering the school affairs. Such duties embrace that of inquiry into the question of the failure of a teacher to perform his contract obligation as a teacher, *and if they find that a teacher has breached his contract it is their duty to take such steps as may be necessary to carry out the purposes of the school. and if a teacher has failed to perform his duties under his contract they can discharge him from further service.*" (emphasis added)

Common school districts in Wisconsin are fiscally independent and have power to levy the school tax. The annual school

/[2]Wisconsin School Boards, 1974-1975 (Wisconsin Department of Public Instruction, 1975), p. 16.

/[3]Chapters 118, 119, Wis. Stats.

tax is levied by the electors at the annual meeting after the budget hearing. s. 120.10, Wis. Stats. Duties as to the possession, care, control and management of the property and affairs of the school district, except as vested directly in the electors at the school meeting, are delegated by statute to the common school district board. s. 120.12 (1), Wis. Stats. The board is given specific authority to make rules for the organization, gradation and government of the district schools. s. 120.13 (1), Wis. Stats. All school district boards are expected to, and do, establish educational goals, approve the school program and determine district spending in accordance with the wishes of the local school community as expressed at open school meeting, the open school board meeting and at the ballot box.

In actuality these and many other functions performed by the school board require that the board members throughout Wisconsin (who serve the interests of some 1,182,000 school-age children comprising approximately 26.2% of the state's population as of July 1, 1972)/[4]be skilled decision makers. That the elected school board members are dedicated public servants is attested to by the fact that they serve without pay as an incentive. The average salary of public school board members for the school year 1974-1975 was $435.00, board members of 34 districts receiving no salary at all./[5]

For the school year 1972-1973 total public school operational costs in Wisconsin were approximately $1,040,781,000, of which approximately $682,858,000, or 65.61% represented instructional costs./[6] Local property taxes levied

/[4]Rankings of the States, 1973 (NEA Research Report, 1973), p. 9.

/[5]Wisconsin School Boards, 1974-1975 (Wisconsin Department of Public Instruction, 1975), p. 15.

/[6]Source: Statistical Records for 1972-1973, Wisconsin Department of Public Instruction.

in 1974 for support of the state's public schools totaled $895,826,831, comprising 61.26% of property taxes levied locally for all purposes (state, county, municipal and school)./7

For the 1973-1974 school year, Wisconsin public school districts, on the average, received 40% of public school revenues in the form of state aid./8 But, as a condition to eligibility for this aid for a given school year, *the board is required by law to hold school and provide actual instruction to students for at least 180 days during the school year* (ss. 121.02(1)(h), 121.17(2)(a), Wis. Stats.), which ends on June 30th (s. 115.01(6), Wis. Stats.).

Among the most important of the duties of policy making and management delegated by the legislature to local school boards are those pertaining to employment and dismissal of teachers (ss. 118.21, 118.22, Wis. Stats.) and to collective bargaining with them on questions of wages, hours and working conditions as required by s. 111.70, Wis. Stats., the Municipal Employment Relations Act (MERA). Under MERA, which is administered and enforced by the Wisconsin Employment Relations Commission (WERC), it is a prohibited practice for the employer school board to refuse to bargain collectively by meeting and conferring in good faith with respect to wages, hours and conditions of employment and with the intention of reaching an agreement, or to refuse to reduce any agreement arrived at to a written signed document. "The duty to bargain, however, does not compel either party to agree to a proposal or require the making of a concession," the legislature specifically recognizing, in creating MERA, "... that the public employer must exercise its powers and responsibilities to act for the

/7Town, Village and City Taxes — 1974 (Wisconsin Department of Revenue, Bull. Nos. 174, 274 and 374 combined, 1975), p. 54.

/8Comparative Analysis of Selected Characteristics, Wisconsin and Neighboring States (Wisconsin Department of Public Instruction, Bull. No. 5231, 1974).

government and good order of the municipality, its commercial benefit and the health, safety and welfare of the public to assure orderly operations and functions within its jurisdiction, subject to those rights secured to public employes by the constitutions of this state and of the United States and by this subchapter." s. 111.70(1)(d), Wis. Stats.

MERA specifically prohibits strikes by public employees. s. 111.70(4)(1), Wis. Stats. From 1962 through June of 1974, during which period the statutory strike prohibition was in effect,/9 there were 105 strikes against local municipal governments in Wisconsin, of which 44 were by public school teachers./10 According to another study for the same period, there were 254,126.5 man days lost due to strikes against Wisconsin local governments, 115,029.5 of which were attributable to teachers on strike./11

This, then, was the Wisconsin setting in the year 1974 when the Hortonville schools were closed by the teachers' strike.

II. The School Board Is A Proper Body To Decide Whether To Discharge Teachers Who Engage In An Illegal Strike Even Though The School Board Has Been Involved In Collective Bargaining With The Union Representing Those Teachers.

Relying primarily on *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, the Wisconsin Supreme Court found that teachers

/9The strike prohibition was enacted by ch. 633, 1961 Session Laws of the State of Wisconsin.

/10Fernbach, Public Employee Strikes in Wisconsin: 1962 to Present (Wisconsin Legislative Council Staff, Info. Memo 74-9, 1974), p. 3.

/11Verberkmoes, Strikes and Public Employee Strikes in Wisconsin, 1962-1974 (Wisconsin Association of School Boards, 1974), p. 2.

who were discharged for engaging in an illegal strike were denied due process of law because in hearing the matter the school board was not an impartial decision maker. It was the state court's view that procedural due process is not limited to the factual determination that the teachers were each engaged in the particular conduct charged, but requires "even in cases of undisputed or stipulated facts, that an impartial decision maker be charged with the responsibility of determining what action shall be taken on the basis of those facts." *Hortonville Education Association v. Hortonville Joint School District No. 1*, 66 Wis. 2d 469, 493, 225 N.W. 2d 658. The court *speculated* that the board's decision to discharge was "possibly a convenient alternative which would eliminate their labor problems in one fell swoop" (*Hortonville, supra* at 494) and held that the post-termination review procedures available under Wisconsin law would not ameliorate any partiality in the original decision because those procedures do not "provide for review to determine whether another course of action such as mediation, injunction, continued collective bargaining or arbitration would have been a more reasonable response on the part of the decision maker." even though the board "was undoubtedly faced with a situation that needed immediate attention" (*Hortonville, supra* at 496).

Based on its finding that a fundamental Fourteenth Amendment protection is involved in this case and that no adequate forum exists under state law to provide the constitutionally required independent decision maker, the court fashioned for Hortonville and for all public school boards in the state of Wisconsin a new remedy whereby when a public school teacher is discharged or otherwise disciplined and due process is required, and the board is in an adversary position, "the dissatisfied teacher or teachers can, upon petition, obtain a de novo determination of all issues in any court of record." *Hortonville, supra* at 498. The court is to resolve any factual dispute and provide for a reasonable disposition.

Amicus respectfully submits that a public school board charged with the important responsibility of operating the public schools, including the hiring and firing of teachers, should not be prohibited from carrying out these obligations merely because it also has a duty to bargain with the union which represents those teachers. It is further submitted that in spite of the fact that a school board is or has been engaged in collective bargaining with a union representing those teachers, it is a fair tribunal to decide whether to discharge teachers who engage in an illegal strike. In any event, in view of the need for expediency and because of the type of determination that has to be made, the school board as an administrative-governmental entity should appropriately decide what course of action to follow, not a court of law.

A. *The function of due process is not furthered by requiring that the decision to discharge striking teachers be made by a person or tribunal other than the public school district board.*

The commonly asserted purposes of due process are: (1) to assure that the facts on which the decision is based are correctly ascertained (1 Davis, Administrative Law Treatise, s. 7.01 (1958)); (2) to enable the individual to build a record which will permit meaningful judicial review of the administrative decision (*McGaugha v. California*, 402 U.S. 183, 268, 91 S.Ct. 1454 (Brennan, J., dissenting)); and (3) to prevent the appearance of unfairness (*Joint Antifascist Refugee Committee v. McGraff*, 341 U.S. 123, 171-172 and note 19, 71 S.Ct. 624 (Frankfurter, J., concurring); *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437). The requirement of an impartial decision maker serves these functions of due process by providing a person or tribunal who will (1) fairly determine *relevant* facts, (2) permit the making of a fair record for review, and (3) prevent the appearance of unfairness.

A school board can adequately serve these functions in the type of case before this court for in cases where the question to be determined is whether or not the teachers have breached their employment contracts and engaged in an illegal strike, there are no difficult factual or legal questions for the board to decide. "The Board's sole objective in conducting the ... hearings is to ensure that innocent teachers were not mistakenly identified as strikers, and there is nothing in the record to indicate that the Board will not perform this duty fairly." *Lake Michigan College Federation of Teachers v. Lake Michigan Community College,* 518 Fed. 2d 1091, 1099 (6th Cir. 1975).

The Wisconsin Supreme Court found that procedural due process is constitutionally required when determining what course of action should be taken on the facts. *Amicus* will, in the next sub-part of this brief, submit that the court misinterpreted the purpose of the hearing; that although the determination of whether teachers were indeed engaged in an illegal strike may be subject to the requirements of procedural due process, the determination of what is to be done upon such a set of facts is not. Even if the premise of the Wisconsin Supreme Court is accepted, however, and the determination of what course of action is to be followed is one requiring procedural due process and an impartial decision maker, we submit that such requirements have been met.

The Wisconsin Court's decision turned on its holding that the school board was not an impartial decision maker. The fairness of the school board, however, should not be impugned because the board has been, or is, involved in bargaining with the union representing the striking teachers for, we submit, the combination of the duties to bargain and to hire and dismiss teachers involves no risk of bias in the constitutional sense. The State Supreme Court's speculation and assumption, without any support in the record, that discharge may have

been a convenient alternative to solve the board's labor problems is, *amicus* submits, neither supported nor justified. Under decisions of this court, improper motivation on the part of the school board having no factual support should not be inferred to disqualify the decision maker. Such an assumption does not "overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin,* 421 U.S. 35, 47, 95 S.Ct. 1456. Without facts to the contrary, school board members, like state administrators, should be "assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." *Withrow v. Larkin, supra* at 55 citing *U.S. v. Morgan,* 313 U.S. 409, 421./[12] We submit that it would have been more proper for the state court to have assumed in this case that any bias the school board may have held was in favor of reopening the schools which had been closed for a considerable time due to the unlawful strike.

B. The decision of the Wisconsin Supreme Court substantially alters the rights of striking teachers and the policy making function of the school board.

The purpose of the hearing is not and should not be to determine what course of action the board should take with

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/[12]Relevant to this point is the discussion of the New Hampshire Supreme Court found in *Farrelly v. Timberlane Regional School District,* — N.H. —, 324 A. 2d 723, 726 (1974):

> Plaintiffs' assertion that they were denied due process because the school board's prior involvement in the case rendered it impossible for them to act as an impartial decisionmaking body, is unsupported by any showing of actual bias or prejudice and it is well established that prior involvement in itself is not a sufficient ground to bar a statutory administrative body from acting as decisionmaker at an otherwise full and fair hearing.

respect to negotiations with the union representing the teachers, nor to determine at that point the course of action best designed to insure the restoration of the governmental function, i.e., the operation of the district schools. Those important decisions are to be determined apart from the hearing and will not be manifested in the form of an unfair decision against a teacher who did not participate in the strike. In this respect, we submit, the State Supreme Court erred when it held that not only the determination of whether or not an illegal strike occurred, and which of the teachers participated therein, must be made in conformity with the protections of procedural due process, but also what actions should appropriately be taken on the basis of such facts. This latter determination is not of a judicial nature. Rather, the school board, as the governmental entity in which school district policy making and managerial responsibilities are placed, must retain the discretion necessary to properly exercise its administrative function. *Amicus* submits that the state court in this case totally misconstrued the purpose of the disciplinary hearing.

In Wisconsin, public school teachers other than those employed in school districts in Milwaukee County, teach under a year-to-year contractual relationship with the school district. ss. 118.21, 118.22, Wis. Stats. The individual teacher contract is, however, subject to the right of the school board to discharge a teacher for just cause (*Millar v. Joint School District*, 2 Wis. 2d 303, 86 N.W. 2d 455 (1957)), and the Wisconsin Supreme Court in this case did find that, under Wisconsin law, discharge is a specific contractual remedy for engaging in an illegal strike (*Hortonville, supra* at 481). However, the court ruled (based on the impartial decision maker requirements of the due process clause) that when teachers engage in an illegal strike they may be discharged for such activity (which constitutes cause for discharge under the contract) only if a court, after the fact, agrees that this was the most reasonable response to the labor

dispute on the part of the school board. This results not only in teachers having greater rights that their counterparts in the private sector where strikers may engage in a legal strike and the employer has the right to replace, but also gives a teacher greater protection when engaging in an illegal strike than that afforded under other circumstances where the teacher may be discharged for cause during the term of the contract. *Amicus* submits that this judicial requirement is directly contrary to the public policy of the state of Wisconsin set forth in s. 111.70, Wis. Stats., which prohibits strikes by public employees, and was found necessary by the court solely because of its misapplication of the U.S. Supreme Court decisions on the impartial decision maker requirement of the due process clause of the U.S. Constitution.

The remedy fashioned by the state court extends to any situation where the school board is in an adversary position *viz a viz* the employee being considered for discharge and thus encourages the teacher/employee to make his public employer an adversary even in non-strike situations. We submit that such a result is clearly not in the public interest.

The decision of the state court also substantially alters the policy making role of the school board which has a mandatory duty to bargain with teachers and to employ and terminate teachers. The effect of the remedy as fashioned by the state court is that a board faced with the actuality of a continuing strike can no longer discharge teachers unless the board is willing to assume that every judge will agree that the discharge was the most reasonable course of action. We submit that striking teachers are dismissed so that replacement teachers may be hired and the operation of the schools restored. However, with the prospect of reinstatement and back pay upon a court later finding some alternative other than discharge a more reasonable response to the labor dispute, a school board will not dare to risk discharge and replacement.

Under the state court's decision, the only other alternative open to the school board to attempt to resolve the strike would be to first exhaust all other methods of strike resolution, including mediation, fact finding, continued bargaining, or seeking a court injunction, during which time the educational process is paralyzed, or at least severely disrupted. *Amicus* submits that this alternative falls short of adequately providing for the public's interest in the continuous and orderly operation of the public schools.

To repeat, the principal concern of a public school board faced with an actual work stoppage is to restore the operation of the important governmental service delegated to it with the shortest possible delay. In making the judgmental decision required to cope with an illegal work stoppage, the school board must consider a number of factors, including: the likelihood of prompt, judicial relief if an injunction is sought; the likelihood of the teachers abiding by a judicial order; the likelihood of effective services by teachers who return to work under court order; the likelihood of rapid resolution of the dispute through collective bargaining, mediation, or other statutory impasse procedures; and the availability of replacement teachers. As elected public officials, boards of education have a concern for their responsibility to serve their community and for their duty to provide for an educational program. They must be permitted to take appropriate and rapid action in the best interest of the school district. To require, that with a strike in progress, the school board must exhaust all other alternatives before resorting to discharge would have a most serious and detrimental effect on the operation of local public schools throughout the state of Wisconsin.

Amicus submits that the importance of public education cannot be overstressed. This court has stated that in today's world a public elementary and secondary education is viewed

as a necessity./[13] In addressing the due process to be accorded to a student suspended from school for a 10 day period, this court stated in *Goss v. Lopez,* 419 U.S. 565, 576, 95 S.Ct. 729:

> ". . . the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child."

C. Due process does not require this result.

The due process clause does not create substantive rights in property. Rather it insures of procedures to protect existing rights. "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents v. Roth,* 408 U.S. 564, 576, 92 S.Ct. 2701. Similarly, the requirement of an impartial decision maker is not meant to be a grant of substantive rights. Rather, it is part of a complex of procedures to insure against wrongful deprivation of existing rights.

The role of the decision maker on termination of government employment is, we submit, to apply an existing standard for discharge. The government employer, when hearing or deliberating upon discharge, is not called upon and should not be required to consider and make policy decisions with respect to matters other than cause for discharge that may well fall within the scope of its governmental functions. Similarly, the role of the judiciary on review of such a decision should be to

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/[13]"Today, education is perhaps the most important function of state and local governments. ... It is the very foundation of good citizenship ... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." *Brown v. Board of Education,* 347 U.S. 483, 493, 74 S.Ct. 686.

determine whether existing standards were fairly applied and should not be to select policy or change decisions permitted to the school board in the exercise of discretion or judgment./[14]

Nor does the due process clause require that the policy making function of the school board be changed.

> ". . . consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by the governmental action." *Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743.

In balancing the interests involved here there is to be considered on the employee's side the deprivation of loss of income and the cloud on employability resulting from the dismissal./[15] However, in this case the employees involved

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/[14]Cf. *Wood v. Strickland*, 420 U.S. 308, 326, 95 S.Ct. 992:

> It is not the role of the federal court to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion ... The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members. ...

/[15]Cf., however, the discussion found in *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F. 2d 1091, 1097 (6th Cir. 1975):

> In the case at hand, the teachers were accused of violating Michigan's no-strike law, and we fail to see how this allegation discredited their honesty, morality, and integrity or damaged their standing in the community. The PERA provides no criminal penalties for illegal strikes. Furthermore, through their pickets and placards the teachers openly announced the fact that they were on strike. *Apparently they did not believe that their conduct was dishonest or immoral or that it would seriously damage their reputation in the community.* (emphasis added)

were already openly engaged in an illegal strike and therefore already experiencing a loss of income. Furthermore, the notice which informed the striking teachers of their discharge invited them to reapply for their postions.

Amicus submits that the teachers' interest in a procedure providing for an impartial decision maker has value only to the extent that it guards against harmful partiality. Given the correct nature of a discharge hearing there is no danger of harmful partiality on the part of the school board when no factual dispute is involved and the application of the rule of law is not intertwined with factual issues, for in such a setting the interest of the teachers would not be significantly furthered by having a person or tribunal other than a school board decide the question of the existence of cause for discharge.

On the other hand, the public's interest in permitting the school board to make this decision is most weighty. The rule of necessity applies in that there is no other body available to make the decision. Further, there is a significant difference between the requirement of an independent decision maker and other procedural due process requirements in that only the former threatens the agency's ability to effectively implement its policy. While other procedural requirements have been found not to offset the individual's interest solely because they may increase expense or cause delay, they do not alter the fundamental nature of the governmental agency.

The literal meaning of the Wisconsin Supreme Court's decision is that elected officials are barred by the due process clause of the federal constitution from carrying out a most important part of the duties which the Wisconsin legislature has delegated to them, for as a result of the decision an elected school board cannot at the same time exercise the two functions of bargaining with employees and terminating their employment in the event the employees engage in conserted unlawful activity. The constitution has not, and should not be construed by this court to prohibit such a logical grouping of governmental functions in the school board.

In most, if not all cases of school and municipal employment in Wisconsin the governing body will be involved in collective bargaining and will become directly involved when negotiations reach the impasse stage. For a court to prohibit an elected school board from performing its statutory duties to evaluate and terminate teachers in those instances where it also is or has been engaged in fulfilling its duty as the governmental employer to bargain collectively with the teachers, poses, *amicus* submits, a grave threat to responsive representative government and local lay control of education. The challenge to the combination of functions such as is involved in this case "assumes too much and would bring down too many procedures designed, and working well, for a governmental structure of great and growing complexity." *Richardson v. Perales*, 402 U.S. 389, 410, 91 S.Ct. 1420; *Withrow v. Larkin*, 421 U.S. 35, 49-50, 95 S.Ct. 1456.

In summary, *amicus* respectfully submits that the combination of functions here involved is a logical grouping in the public school board and ought to be determined by this Court to be constitutionally antiseptic for there is no significant interest of striking teachers which would be served by separation of these functions. On the other hand, retention of these combined functions is most important since they lie at the core of the governmental function of the school board. Judicial divestment of one of these legislative functions from the school board in the setting of this case would, we submit, have the deleterious result of diminishing the necessary qualities of responsiveness and representative government and would particularly threaten local lay control of public school education. The Wisconsin Supreme Court recognized but did not adopt this argument when it stated that its disposition of the case was not ideal because the court under the remedy fashioned "may be required to make public policy decisions that are better left to a legislative or administrative body." *Hortonville, supra* at 498.

III. Even If It Is Not An "Impartial Tribunal," The Decision Of A Wisconsin School Board To Discharge Striking Teachers Would Not Violate Due Process.

Assuming that the school board does not meet constitutional tests of a fair tribunal in discharging teachers who are engaged in an illegal strike, because it has previously engaged in collective bargaining with the union representing those teachers, the school board may, nevertheless, discharge the striking teachers without violating their rights to due process.

A. Due process does not require that a decision to terminate interests in public employment be made by an impartial decision maker where post-termination review procedures before an impartial decision maker are available to the terminated employee.

In *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, this court held that the due process guarantee of the Fourteenth Amendment may not be offended where a public employee is initially discharged by a biased decision maker. In *Arnett* a non-probationary federal employee entitled under the Lloyd-LaFollette Act (5 U.S.C. s. 7501), not to be discharged except for cause was dismissed without a trial-type hearing by a superior official whom he had allegedly defamed. It was assumed that this official was not an impartial decision maker. Nonetheless, a majority of this court found no violation of due process. This holding was supported by two opinions and two rationale. In an opinion written by Mr. Justice Rehnquist, an impartial

decision maker was found not to be required because it was not provided for by statute (*Arnett, supra* at pp. 155-156, note 21); an opinion by Mr. Justice Powell, on the other hand, suggested that, on balancing the interests involved, a pre-termination "hearing" before an impartial decision maker was not constitutionally required where the employee was entitled to a full evidentiary hearing before an impartial decision maker after removal, with the right to reinstatement and back pay if the discharge is found to be improper (*Arnett, supra* at p. 170, note 5). Thus at least in those instances where a post-termination evidentiary hearing is available to the discharged employee, with the right to reinstatement and back pay if the discharge is found to be improper, due process does not require an impartial decision maker at the pre-termination level.

Assuming that the school board is not an impartial tribunal, the present case is directly analogous to *Arnett*. The Wisconsin Supreme Court found that the discharge deprived the striking teachers of liberty and property interests. However, with respect to the liberty interests, the purpose of the due process hearing is to allow the charged person an opportunity to clear his name. *Board of Regents v. Roth*, 408 U.S. 564, 573, footnote 12, 92 S.Ct. 2701. A pre-termination hearing is not required:

> ". . . that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which could wrongfully injure the reputation of an employee. Since the purpose of the hearing in such a case is to provide the person 'an opportunity to clear his name,' a hearing afforded by administrative appeal procedures after the actual dismissal is a sufficient compliance with the requirements of the Due Process Clause." *Arnett, supra* at 157.

In this case the property interests of the discharged teachers arose by virtue of their teaching contracts. Neither the statutes providing for the teaching contract and rights

under the contract (ss. 118.21, 118.22, Wis. Stats.), nor the contract itself provide for an independent decision maker upon discharge under the contract. In addition, state law provides for various forms of post-termination review of the discharge before an independent decision maker who, upon a determination that discharge was improper, may order back pay and/or reinstatement.

B. Post-termination review procedures before an impartial decision maker, available to the discharged teachers under state law, adequately protect their interest.

(1) Action for Breach of Contract.

The contractual relationship between a teacher and the school board provides the teacher with job security in the form of employment during the contract term absent sufficient cause for discharge. A teacher who feels that he or she was wrongfully dismissed during the contractual term may institute an action for breach of contract in the state circuit or county court. An action for breach of contract involves a full evidentiary hearing before an independent judicial decision maker with respect to all issues of fact and law concerning whether or not there was sufficient cause for termination of the employment contract. *Millar v. Joint School District 2*, Wis. 2d 303, *supra*.

(2) Review by Common Law Writ of Certiorari

In addition, the discharged teachers can have all issues concerning the validity of the discharge proceeding, as well as the existence of cause for discharge, judicially reviewed by

petition for a writ of certiorari. In Wisconsin, a writ of certiorari is a common law writ issuable by courts of record in the exercise of their superintendent or supervisory control over lower judicial tribunals and quasi-judicial boards and commissions. It is available to review final determination of all tribunals including school boards acting in a quasi-judicial capacity wherever there is no statutory provision for judicial review. *State ex rel. Johnson v. Cady*, 50 Wis. 2d 540, 549-550, 185 N.W. 2d 306 (1971). The scope of review on certiorari extends to: (1) whether the agency exceeded its jurisdiction, (2) whether it correctly applied applicable law, (3) whether the action of the agency or board was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and (4) whether the evidence was such that the agency might reasonably make the order or determination in question. *State ex rel. Ball v. McPhee*, 6 Wis. 2d 190, 199, 94 N.W. 2d 711 (1959); *State v. Goulette*, 65 Wis. 2d 207, 222 N.W. 2d 622 (1974) (cited in *Hortonville, supra* at 496).

(3) Review by WERC

Wisconsin statutes provide that it is a prohibited practice for municipal employers to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. s.111.70 (3) (a) 5, Wis. Stats. At the time of discharge of the striking teachers in this case, "the power of the board to discharge a teacher for 'just cause' was clearly preserved in the master contract between HEA and the school district." *Hortonville, supra* at 481. Thus, under s. 111.70 (3) (a) 5 the striking teachers had the right to a post-discharge evidentiary hearing before the WERC with respect to whether or not their discharge was for "just cause."

In addition, the matter suggested by the Wisconsin Supreme Court as a possible motive of the school board for dismissing the striking teachers, that is to avoid their

obligation to bargain with the union representing the teachers, is an independent prohibited practice under state law. It is a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employees in the exercise of their rights to self organization, to form, join or assist a labor organization, to bargain collectively through representatives of their own choosing and to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection. ss. 111.70 (3) (a) 1, 111.70 (2), Wis. Stats. It is also a prohibited practice for a municipal employer to refuse to bargain in good faith with the collective bargaining representative of municipal employees. s. 111.70 (3) (a) 4, Wis. Stats. Under these sections, a complaint alleging that the striking teachers were discharged in derogation of their right to organize and engage in collective bargaining is independently reviewable by the WERC.

Upon a finding by the WERC that striking teachers were discharged in violation of the collective bargaining agreement or in derogation of their rights to organize and bargain collectively, the WERC may order reinstatement and back pay. ss. 111.70 (4) (a), 111.07 (4), Wis. Stats. See also *Muskego-Norway C.S.J.S.C. No. 9 v. WERB*, 35 Wis. 2d 540, 151 N.W. 2d 617 (1967).

C. The Wisconsin Supreme Court failed to consider the adequacy of an action for breach of contract and incorrectly found review by certiorari or the WERC inadequate.

Although the issue was raised, the Wisconsin Supreme Court failed to consider the adequacy of an action for breach of contract as a method of post-termination review before an independent and impartial decision maker. Further, the court found review by certiorari and by the WERC inadequate

because neither of these alternatives provide, on review, for an independent decision maker determination of whether another more reasonable course of action such as mediation, injunction, continued collective bargaining or arbitration, should have been the response to the strike on the part of the decision maker. *Hortonville, supra* at 496. *Amicus* respectfully submits that post-termination review need not and should not include such a determination. The existing post-termination review procedures available to discharged public school teachers adequately protect their constitional rights and interests.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

James F. Clark
Karen A. Mercer
ELA, ESCH, HART & CLARK
Suite 600, 122 West Washington Avenue
Madison, Wisconsin 53703